



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1985

[Docket Number: OSHA-2011-0540]

RIN 1218–AC58

Procedures for Handling Retaliation Complaints Under the Employee Protection Provision of the Consumer Financial Protection Act of 2010

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations governing the employee protection (whistleblower) provisions of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (CFPA). An interim final rule establishing procedures for these provisions and requesting public comment was published in the Federal Register on April 3, 2014. Two comments were received. This rule responds to those comments and establishes the final procedures and time frames for the handling of retaliation complaints under CFPA, including procedures and timeframes for employee complaints to the Occupational Safety and Health Administration (OSHA), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor) and judicial review of the Secretary of Labor's final decision.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background.

The Consumer Financial Protection Act of 2010 was enacted as Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. 111-203, 124 Stat. 1376, on July 21, 2010. The Act established the Consumer Financial Protection Bureau (Bureau) as an independent bureau within the Federal Reserve System and gave the Bureau the power to regulate the offering and provision of consumer financial products or services under more than a dozen Federal consumer financial laws. The laws subject to the Bureau's jurisdiction generally include, among others, the Consumer Financial Protection Act of 2010, the Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.), the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.), the Fair Credit Billing Act (15 U.S.C. 1666 et seq.), the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.), the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.), the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.), and the Truth in Lending Act (15 U.S.C. 1601 et seq.). The regulations to be enforced by the Bureau include certain regulations issued by seven “transferor

agencies,” including the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development. The Bureau also has concurrent authority to enforce the Telemarketing Sales Rule issued by the Federal Trade Commission. The Bureau published an initial list of such rules and regulations. See 76 FR 43569-71 (July 21, 2011). It has also revised and republished many of these regulations and announced its intention to continue doing so. See, e.g., Streamlining Inherited Regulations, 76 FR 75825 (Dec. 5, 2011); Fall 2014 Unified Regulatory Agenda and Regulatory Plan, Consumer Financial Protection Bureau Statement of Regulatory Priorities, available at http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201410/Statement_3170.html.

The Bureau also has authority to issue new rules, orders, and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.

More information about the Bureau, its jurisdiction, and the laws and regulations it enforces is available at its web site, <http://www.consumerfinance.gov/the-bureau>.

Section 1057 of the Dodd-Frank Act, codified at 12 U.S.C. 5567 and referred to throughout this final rule as CFPB, provides protection to covered employees, and authorized representatives of such employees, against retaliation because they provided information to their employer, to the Bureau, or to any other Federal, State, or local government authority or law enforcement agency relating to any violation of (or any act or omission that the employee reasonably believes to be a violation of) any provision of the Act or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition

prescribed by the Bureau; testified or will testify in any proceeding resulting from the administration or enforcement of any provision of the Act or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau; filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau. The section applies to covered persons and service providers. Examples of these include, but are not limited to, providers of the following financial products or services: (1) residential mortgage loan origination, brokerage, and servicing, modification and foreclosure relief services; (2) student loans; (3) payday loans; (4) debt collection; (5) credit reporting; (6) finance companies, lending, and loan servicing and brokerage; (7) money transmitting and check cashing services; (8) prepaid card services; (9) debt life services, and (10) certain service providers and certain affiliates related to such an entity.

This final rule establishes procedures for the handling of whistleblower complaints under CFPA.

II. Summary of Statutory Procedures

CFPA's whistleblower provisions include procedures that allow a covered employee to file a complaint with the Secretary of Labor (Secretary) within 180 days of the alleged retaliation. Upon receipt of the complaint, the Secretary must provide written notice to the person or persons named in the complaint alleged to have violated the Act (respondent) of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the respondent throughout the investigation.

The Secretary must then, within 60 days of receipt of the complaint, afford the complainant and respondent an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation.

The statute provides that the Secretary may conduct an investigation only if the complainant has made a prima facie showing that the protected activity was a contributing factor in the adverse action alleged in the complaint and the respondent has not demonstrated, through clear and convincing evidence, that it would have taken the same adverse action in the absence of that activity (see section 1985.104 for a summary of the investigation process). OSHA interprets the prima facie case requirement as allowing the complainant to meet this burden through the complaint as supplemented by interviews of the complainant.

After investigating a complaint, the Secretary will issue written findings. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that retaliation has occurred, the Secretary must notify the respondent of those findings, along with a preliminary order that requires the respondent to, where appropriate: take affirmative action to abate the violation; reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as all costs and expenses (including attorney fees and expert witness fees) reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

The complainant and the respondent then have 30 days after the date of receipt of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing before an administrative law judge (ALJ) at the Department of Labor. The

filing of objections under CFPA will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an ALJ is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, CFPA requires the hearing to be conducted “expeditiously.” The Secretary then has 120 days after the conclusion of any hearing in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary’s final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding. Where the Secretary has determined that a violation has occurred, the Secretary, where appropriate, will assess against the respondent a sum equal to the total amount of all costs and expenses, including attorney and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order. The Secretary also may award a prevailing employer reasonable attorney fees, not exceeding \$1,000, if the Secretary finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary’s final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation.

CFPA permits the employee to seek de novo review of the complaint by a United States district court in the event that the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after the date of receipt of a written determination. The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy and that the case will be tried before a jury at the request of either party.

Finally, CFPA provides that except in very limited circumstances, and notwithstanding any other provision of law, the rights and remedies provided for in the CFPA whistleblower provision may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement, and no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under CFPA's whistleblower provision.

III. Summary and Discussion of Rulemaking Proceedings and Regulatory Provisions

On April 3, 2014, OSHA published in the Federal Register an interim final rule (IFR), promulgating rules governing the employee protection (whistleblower) provisions of CFPA. 79 FR 18630. In addition to promulgating the IFR, OSHA's publication included a request for public comment on the IFR by June 2, 2014. OSHA received two comments: one from an individual, Chris Strickling, and one from an organization, International Bancshares Corporation (IBC). Mr. Strickling expressed general support for protecting whistleblowers, but his comment did not address any particular provision of the IFR. IBC criticized several provisions of the IFR, however its criticisms all related to statutory requirements in CFPA itself, rather than the regulatory choices that OSHA has made in these procedural rules. Accordingly, no changes were made to the rule based on public comments. Several small changes were made, however, to clarify the final rule and to make the final rule consistent with OSHA's other, recently promulgated whistleblower rules. These changes and OSHA's response to each of IBC's comments is discussed below.

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of CFPA. Responsibility for receiving and investigating

complaints under CFPA has been delegated to the Assistant Secretary for Occupational Safety and Health (Assistant Secretary) by Secretary's Order 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by ALJs are decided by the ARB. Secretary of Labor's Order No. 2-2012, 77 FR 69378 (Nov. 16, 2012).

Subpart A – Complaints, Investigations, Findings and Preliminary Orders.

Section 1985.100 Purpose and scope.

This section describes the purpose of the regulations implementing CFPA and provides an overview of the procedures covered by these regulations. This section has been reworded slightly for consistency with other whistleblower procedural rules.

Section 1985.101 Definitions.

This section includes the general definitions from Section 1002 of the Dodd-Frank Act, 12 U.S.C. 5481, which are applicable to CFPA's whistleblower provisions. The Act defines the term "affiliate" as "any person that controls, is controlled by, or is under common control with another person." 12 U.S.C. 5481(1). It defines the term "consumer" as "an individual or an agent, trustee, or representative acting on behalf of an individual." 12 U.S.C. 5481(4).

In the IFR, OSHA defined "Bureau" as "the Bureau of Consumer Financial Protection." This definition was used in the CFPA. However, when the Bureau came into existence, it was named the Consumer Financial Protection Bureau. The definition of "Bureau" has been changed to reflect the current name of the agency.

The Act defines a "consumer financial product or service" to include a wide variety of financial products or services offered or provided for use by consumers primarily for personal, family, or household purposes, and certain financial products or services that are delivered,

offered, or provided in connection with a consumer financial product or service. See 12 U.S.C. 5481(5), (15). Examples of these include, but are not limited to, residential mortgage origination, lending, brokerage and servicing, and related products and services such as mortgage loan modification and foreclosure relief; student loans; payday loans; and other financial services such as debt collection, credit reporting, credit cards and related activities, money transmitting, check cashing and related activities, prepaid cards, and debt relief services.

The Act defines “covered person” as “any person that engages in offering or providing a consumer financial product or service” and “any affiliate of [such] a person . . . if [the] affiliate acts as a service provider to such person.” 12 U.S.C. 5481(6). It defines the term “person” as “an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.” 12 U.S.C. 5481(19). The law defines “service provider” as “any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that -- (i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service” 12 U.S.C. 5481(26)(A). The term “service provider” does not include a person who solely offers or provides certain general business support services or advertising services. 12 U.S.C. 5481(26)(B). Anyone who is a “service provider” is also “deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service.” 12 U.S.C. 5481(26)(C).

CFPA defines “covered employee” as “any individual performing tasks related to the offering or provision of a consumer financial product or service.” 12 U.S.C. 5567(b). Consistent with the other whistleblower protection provisions administered by OSHA, OSHA interprets the

term “covered employee” to also include individuals presently or formerly working for, individuals applying to work for, and individuals whose employment could be affected by a covered person or service provider where such individual was performing tasks related to the offering or provision of a consumer financial product or service at the time that the individual engaged in protected activity under CFPA. See, e.g., 29 CFR 1979.101; 29 CFR 1980.101(g); 29 CFR 1981.101; 29 CFR 1982.101(d); 29 CFR 1983.101(h). OSHA believes this interpretation of the term “covered employee” best implements the broad statutory protections of CFPA, which aim to protect individuals who perform tasks related to the offering or provision of a consumer financial product or service from termination or any other form of retaliation resulting from their protected activity under CFPA. OSHA received no comments on this section of the IFR. In addition to the change in the Bureau’s official name noted above, OSHA moved the rule of construction that a person that is a service provider shall be deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service from the definition of “covered person” in paragraph (j) to the definition of “service provider” in paragraph (p) to better mirror the statutory definitions in 12 U.S.C. 5481. Section 1985.102 Obligations and prohibited acts.

This section describes the activities that are protected under CFPA and the conduct that is prohibited in response to any protected activities. As described above, CFPA protects individuals who provide information to their employer, to the Bureau, or to any other Federal, State, or local government authority or law enforcement agency relating to any violation of (or any act or omission that the employee reasonably believes to be a violation of) any provision of the Act or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau. CFPA also protects individuals who

object to, or refuse to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believes to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.

In order to have a “reasonable belief” under CFPA, a complainant must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the listed categories of law. See Sylvester v. Parexel Int’l LLC, ARB No. 07-123, 2011 WL 2165854, at *11-12 (ARB May 25, 2011) (discussing the reasonable belief standard under analogous language in the Sarbanes-Oxley Act whistleblower provision, 18 U.S.C. 1514A). The requirement that the complainant have a subjective, good faith belief is satisfied so long as the complainant actually believed that the conduct complained of violated the relevant law, rule, order, standard, or prohibition. See id. The objective “reasonableness” of a complainant’s belief is typically determined “based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.” Id. at *12 (internal quotation marks and citation omitted). However, the complainant need not show that the conduct complained of constituted an actual violation of law. Pursuant to this standard, an employee’s whistleblower activity is protected where it is based on a reasonable, but mistaken, belief that a violation of the relevant law has occurred. Id. at *13.

IBC raised concerns that the scope of protected activity under this section had the potential to be so broad as to be practically unworkable. In particular, IBC was concerned that under 29 CFR 1985.102(b) covered employees are protected from reporting alleged violations of not only the federal consumer protection laws that were transferred, in whole or in part, to the Bureau, but also for violations of any law subject to the jurisdiction of, or enforceable by the Bureau, which includes the Bureau’s “wide-ranging catchall authority to regulate ‘unfair,

deceptive, or abusive practices' . . . related to the provision of consumer financial products or services.” The text of 29 CFR 1985.102(b) parallels the statutory text in 12 U.S.C. 5567(a).

OSHA believes the provision accurately reflects the scope of protected activity in the statute and has made no changes in response to this comment.

Section 1985.103 Filing of retaliation complaint.

This section explains the requirements for filing a retaliation complaint under CFPA. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs.

Under Delaware State College v. Ricks, 449 U.S. 250, 258 (1980), this is considered to be when the retaliatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer’s decision to take an adverse action. Equal Emp’t Opportunity Comm’n v. United Parcel Serv., Inc., 249 F.3d 557, 561-62 (6th Cir. 2001). The time for filing a complaint under CFPA may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

Complaints filed under CFPA need not be in any particular form. They may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. With the consent of the employee, complaints may be filed by any person on the employee’s behalf.

OSHA notes that a complaint of retaliation filed with OSHA under CFPA is not a formal document and need not conform to the pleading standards for complaints filed in federal district court articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal,

556 U.S. 662 (2009). See Sylvester v. Parexel Int'l, Inc., ARB No. 07–123, 2011 WL 2165854, at *9-10 (ARB May 25, 2011) (holding that whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards). Rather, the complaint filed with OSHA under this section simply alerts OSHA to the existence of the alleged retaliation and the complainant’s desire that OSHA investigate the complaint. Upon receipt of the complaint, OSHA is to determine whether the “complaint, supplemented as appropriate by interviews of the complainant” alleges “the existence of facts and evidence to make a prima facie showing.” 29 CFR 1985.104(e). As explained in section 1985.104(e), if the complaint, supplemented as appropriate, contains a prima facie allegation, and the respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. See 12 U.S.C. 5567(c)(2)(B), 29 CFR 1985.104(e).

IBC commented that whistleblowers generally should be required to use employer-sponsored reporting programs as a condition of being entitled to a whistleblower award. IBC further expressed the concern that “the interim final rules do not require whistleblowers to first report internally before filing a complaint and thus, . . . many employees will bypass established internal procedures and take their concerns directly and exclusively to the DOL/OSHA.” IBC further noted that many financial institutions have developed strong internal compliance procedures to encourage employees, agents, and other company insiders to report suspected violations of applicable law, and to protect those who make such reports. These mechanisms assist financial institutions in promptly addressing violations of law and company policy. OSHA agrees with IBC that internal reporting mechanisms, particularly those that include protections of

an employee's confidentiality and safeguards against retaliation, can play a constructive role in ensuring that a provider of consumer financial products and services fully complies with consumer financial protection laws and regulations. These policies can foster a culture of compliance by helping to ensure that employees feel free to come forward with concerns regarding potential violations of the law. However, CFPA protects employees regardless of whether they report internally or to a government agency. See 12 U.S.C. 5567(a) (listing activities protected under CFPA). The statute, moreover, requires employees who believe they have suffered retaliation for engaging in protected whistleblowing, to file a complaint with the Secretary of Labor within 180 days of the retaliation. See 12 U.S.C. 5567(c)(1). OSHA does not have authority to impose an internal reporting requirement as a prerequisite to filing a retaliation complaint with OSHA. Accordingly, OSHA has made no changes to this section.

Section 1985.104 Investigation.

This section describes the procedures that apply to the investigation of CFPA complaints. Paragraph (a) of this section outlines the procedures for notifying the parties and the Bureau of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) describes OSHA's procedures for sharing a party's submissions during a whistleblower investigation with the other parties to the investigation. It has been revised to encourage the parties to provide documents to each other during the investigation and to clarify the opportunities for each party to provide information to OSHA during the investigation. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) of this section sets forth the applicable burdens of proof. CFPA requires that a complainant make an initial prima facie showing that a protected activity was "a

contributing factor” in the adverse action alleged in the complaint, i.e., that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer’s decision. The qualifier “(i.e. a non-frivolous allegation)” has been removed from paragraph (e)(1) in order to make it consistent with other whistleblower regulations. The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. The complainant’s burden may be satisfied, for example, if he or she shows that the adverse action took place within a temporal proximity of the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. See, e.g. Porter v. Cal. Dep’t of Corrs., 419 F.3d 885, 895 (9th Cir. 2005) (years between the protected activity and the retaliatory actions did not defeat a finding of a causal connection where the defendant did not have the opportunity to retaliate until he was given responsibility for making personnel decisions).

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. See Trimmer v. U.S. Dep’t of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the Energy Reorganization Act of 1974 (ERA), which is the same as that under CFPA, serves a “gatekeeping function” that “stem[s] frivolous complaints”). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss a complaint under CFPA and not investigate further if either: (1) the complainant fails to meet the prima facie

showing that protected activity was a contributing factor in the adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the statute requires OSHA to determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” Marano v. Dep’t of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (internal quotation marks, emphasis and citation omitted) (discussing the Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); see also Addis v. Dep’t of Labor, 575 F.3d 688, 689-91 (7th Cir. 2009) (discussing Marano as applied to analogous whistleblower provision in the ERA); Clarke v. Navajo Express, Inc., ARB No. 09-114, 2011 WL 2614326, at *3 (ARB June 29, 2011) (discussing burdens of proof under an analogous whistleblower provision in the Surface Transportation Assistance Act (STAA)). For protected activity to be a contributing factor in the adverse action, “a complainant need not necessarily prove that the respondent’s articulated reason was a pretext in order to prevail,” because a complainant, alternatively, can prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct,” and that another reason was the complainant’s protected activity. See Klopfenstein v. PCC Flow Techs. Holdings, Inc., ARB No. 04-149, 2006 WL 3246904, at *13 (ARB May 31, 2006) (quoting Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004)) (discussing contributing factor test under the Sarbanes-Oxley Act of 2002 whistleblower provision), aff’d sub nom. Klopfenstein v. Admin. Review Bd., U.S. Dep’t of Labor, 402 F. App’x 936, 2010 WL 4746668 (5th Cir. 2010).

If OSHA finds reasonable cause to believe that the alleged protected activity was a contributing factor in the adverse action, OSHA may not order relief if the employer demonstrates by “clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 12 U.S.C. 5567(c)(3)(C). The “clear and convincing evidence” standard is a higher burden of proof than a “preponderance of the evidence” standard. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain. Clarke, 2011 WL 2614326, at *3.

Paragraph (f) describes the procedures OSHA will follow prior to the issuance of findings and a preliminary order when OSHA has reasonable cause to believe that a violation has occurred. Its purpose is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted by the Supreme Court in Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) (requiring OSHA to give a STAA respondent the opportunity to review the substance of the evidence and respond, prior to ordering preliminary reinstatement). The phrase, “Before providing such materials, OSHA will redact them, if necessary, in accordance with the Privacy Act of 1974” has been changed to “Before providing such materials, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974” to be consistent with OSHA’s practices under other whistleblower statutes.

IBC commented on this section, noting that OSHA interprets the prima facie case requirement as allowing the complainant to meet its burden through the complaint supplemented by interviews of the complainant whereas the respondent must meet the more difficult “clear and convincing” standard. In IBC’s view, this burden shifting regime is unfair and presents an unequal playing field placing the employer at a significant disadvantage.

However, as explained herein, the requirement that the complainant make a prima facie showing based on the complaint and interviews of the complainant is a threshold requirement for OSHA to conduct an investigation. The purpose of this threshold requirement is to stem frivolous complaints. Once an investigation commences, the statute requires OSHA to determine, based on all evidence submitted or developed by OSHA, whether there is reasonable cause to believe that the complaint has merit. 12 U.S.C. 5567(2)(A). In addition, even when OSHA has reasonable cause to believe that protected whistleblowing contributed to action taken against an employee, the statute states that the Secretary may not order relief if the employer demonstrates by clear and convincing evidence that it would have taken the same action in the absence of protected whistleblowing. 12 U.S.C. 5567(c)(3)(C). OSHA believes its regulations accurately reflect these statutory requirements. Apart from the changes to paragraphs (c) and (e) described above, OSHA has reworded paragraphs (a) and (f) slightly to clarify the paragraphs without changing their meaning.

Section 1985.105 Issuance of findings and preliminary orders.

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue, within 60 days of the filing of a complaint, written findings regarding whether or not there is reasonable cause to believe that the complaint has merit. If the findings are that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate relief, including preliminary reinstatement, affirmative action to abate the violation, back pay with interest, and compensatory damages. The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. The findings and, where appropriate, the preliminary order, also advise the respondent of the right to request an award of attorney fees not

exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 30 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

As explained in the IFR, in ordering interest on back pay under CFPA, the Secretary has determined that interest due will be computed by compounding daily the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621 is generally the Federal short-term rate plus three percentage points. 79 FR 18635. The Secretary has long applied the interest rate in 26 U.S.C. 6621 to calculate interest on backpay in whistleblower cases. Doyle v. Hydro Nuclear Servs., ARB Nos. 99-041, 99-042, 00-012, 2000 WL 694384, at *14–15, 17 (ARB May 17, 2000); see also Cefalu v. Roadway Express, Inc., ARB No. 09-070, 2011 WL 1247212, at *2 (ARB Mar. 17, 2011); Pollock v. Cont'l Express, ARB Nos. 07-073, 08-051, 2010 WL 1776974, at *8 (ARB Apr. 10, 2010); Murray v. Air Ride, Inc., ARB No. 00-045, slip op. at 9 (ARB Dec. 29, 2000). Section 6621 provides the appropriate measure of compensation under CFPA and other DOL-administered whistleblower statutes because it ensures the complainant will be placed in the same position he or she would have been in if no unlawful retaliation occurred. See Ass't Sec'y v. Double R. Trucking, Inc., ARB No. 99-061, slip op. at 5 (ARB July 16, 1999) (interest awards pursuant to § 6621 are mandatory elements of complainant's make-whole remedy). Section 6621 provides a reasonably accurate prediction of market outcomes (which represents the loss of investment opportunity by the complainant and the employer's benefit from use of the withheld money) and thus provides the complainant with

appropriate make-whole relief. See EEOC v. Erie Cnty., 751 F.2d 79, 82 (2d Cir. 1984) (“[s]ince the goal of a suit under the [Fair Labor Standards Act] and the Equal Pay Act is to make whole the victims of the unlawful underpayment of wages, and since [§ 6621] has been adopted as a good indicator of the value of the use of money, it was well within” the district court’s discretion to calculate prejudgment interest under § 6621); New Horizons for the Retarded, Inc., 283 N.L.R.B. No. 181, 1987 WL 89652, at *2 (NLRB May 28, 1987) (observing that “the short-term Federal rate [used by § 6621] is based on average market yields on marketable Federal obligations and is influenced by private economic market forces”). Similarly, as explained in the IFR, daily compounding of the interest award ensures that complainants are made whole for unlawful retaliation in violation of CFPA. 79 FR 18635.

As explained in the IFR, in ordering back pay, OSHA will require the respondent to submit the appropriate documentation to the Social Security Administration allocating the back pay to the appropriate calendar quarters. Requiring the reporting of back pay allocation to the SSA serves the remedial purposes of CFPA by ensuring that employees subjected to retaliation are truly made whole. See 79 FR 18635; see also Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB No. 10, 2014 WL 3897178, at *4-5 (NLRB Aug. 8, 2014).

Finally, as noted in the IFR, in limited circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he or she received prior to termination, but not actually return to work. See 79 FR 18636. Such “economic reinstatement” is akin to an order for front pay and frequently is employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, which protects miners from retaliation. 30 U.S.C. 815(c); see, e.g., Sec’y of Labor ex rel. York v. BR&D Enters., Inc., 23 FMSHRC 697, 2001 WL 1806020, at *1 (ALJ June 26, 2001). Front pay has

been recognized as a possible remedy in cases under the whistleblower statutes enforced by OSHA in limited circumstances where reinstatement would not be appropriate. See, e.g., Luder v. Cont'l Airlines, Inc., ARB No. 10-026, 2012 WL 376755, at *11 (ARB Jan. 31, 2012), aff'd, Cont'l Airlines, Inc. v. Admin. Rev. Bd., No. 15-60012, slip op. at 8, 2016 WL 97461, at *4 (5th Cir. Jan. 7, 2016) (unpublished) (under Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, “front-pay is available when reinstatement is not possible”); Moder v. Vill. of Jackson, ARB Nos. 01-095, 02-039, 2003 WL 21499864, at *10 (ARB June 30, 2003) (under environmental whistleblower statutes, “front pay may be an appropriate substitute when the parties prove the impossibility of a productive and amicable working relationship, or the company no longer has a position for which the complainant is qualified”).

IBC made two comments on this section of the rule. First, IBC expressed the view that 60 days is too short a time for OSHA to complete an investigation, and suggested that 120 days would be more appropriate. OSHA notes that the 60-day time frame for an investigation is provided for in the CFPA statute. See 12 U.S.C. 5567(2)(A). However, 60 days is often not enough time for the agency to complete a whistleblower investigation that gives the parties adequate opportunity to present their evidence to OSHA. The fact that an investigation extends beyond 60 days will not deprive OSHA of jurisdiction to complete the investigation. Cf., Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1066 (5th Cir. 1991) (finding Secretary does not lose jurisdiction over whistleblower complaint when a final decision is not issued within 120 days of completion of the hearing).

IBC also stated that the potential \$1,000 penalty against complainants who submit frivolous whistleblower complaints is de minimis and will not deter such claims. In IBC's view, the rules did not provide much protection against frivolous complaints. OSHA notes that, as a

protection against frivolous complaints, under 12 U.S.C. 5567(c)(3), OSHA must dismiss complaints that do not meet the prima facie allegation requirement without investigation. The \$1,000 potential penalty for frivolous complaints is capped by the statute, and OSHA does not have authority to increase this penalty. See 12 U.S.C. 5567(c)(4)(C). Accordingly, OSHA has made no changes to this section in response to IBC's comments. OSHA has omitted an unnecessary abbreviation in paragraph (a)(1).

Subpart B – Litigation.

Section 1985.106 Objections to the findings and the preliminary order and requests for a hearing.

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record, as well as the OSHA official who issued the findings and order, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards, the failure to serve copies of the objections on the other parties of record does not affect the ALJ's jurisdiction to hear and decide the merits of the case. See Shirani v. Calvert Cliffs Nuclear Power Plant, Inc., ARB No. 04-101, 2005 WL 2865915, at *7 (ARB Oct. 31, 2005).

The timely filing of objections stays all provisions of the preliminary order, except for the portion requiring reinstatement. A respondent may file a motion to stay the Assistant Secretary's

preliminary order of reinstatement with the Office of Administrative Law Judges. However, such a motion will be granted only based on exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary's preliminary order of reinstatement under CFPA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, i.e., irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay. If no timely objection to the Assistant Secretary's findings and/or preliminary order is filed, then the Assistant Secretary's findings and/or preliminary order become the final decision of the Secretary not subject to judicial review. OSHA received no comments on this section, and no changes were made to it.

Section 1985.107 Hearings.

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, as set forth in 29 CFR part 18 subpart A. This section provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. As noted in this section, formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious. OSHA received no comments on this section, and no changes were made to it.

Section 1985.108 Role of Federal agencies.

The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings under CFPA. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision

based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although OSHA anticipates that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, multiple employees, alleged violations that appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Bureau, if interested in a proceeding, also may participate as amicus curiae at any time in the proceedings. OSHA received no comments on this section. However, OSHA has revised section (a)(2) slightly to clarify that documents must be provided to the Assistant Secretary and the Associate Solicitor for Fair Labor Standards during the litigation only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules.

Section 1985.109 Decision and orders of the administrative law judge.

This section sets forth the requirements for the content of the decision and order of the ALJ, and includes the standard for finding a violation under CFPA. Specifically, the complainant must demonstrate (i.e. prove by a preponderance of the evidence) that the protected activity was a “contributing factor” in the adverse action. See, e.g., Allen v. Admin. Rev. Bd., 514 F.3d 468, 475 n.1 (5th Cir. 2008) (“The term ‘demonstrates’ [under identical burden-shifting scheme in the Sarbanes-Oxley whistleblower provision] means to prove by a preponderance of the evidence.”). If the employee demonstrates that the alleged protected activity was a contributing factor in the adverse action, the employer, to escape liability, must demonstrate by

“clear and convincing evidence” that it would have taken the same action in the absence of the protected activity. See 12 U.S.C. 5567(c)(3)(C).

Paragraph (c) of this section further provides that OSHA’s determination to dismiss the complaint without an investigation or without a complete investigation under section 1985.104 is not subject to review. Thus, section 1985.109(c) clarifies that OSHA’s determinations on whether to proceed with an investigation under CFPA and whether to make particular investigative findings are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore, as a general matter, may not remand cases to OSHA to conduct an investigation or make further factual findings. Paragraph (d) notes the remedies that the ALJ may order under CFPA and, as discussed under section 1985.105 above, provides that interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily, and that the respondent will be required to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters. Paragraph (e) requires that the ALJ’s decision be served on all parties to the proceeding, OSHA, and the U.S. Department of Labor’s Associate Solicitor for Fair Labor Standards. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ’s order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the ARB. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. OSHA received no comments on this section. OSHA omitted an unnecessary abbreviation from this section but has made no other changes to it.

Section 1985.110 Decision and orders of the Administrative Review Board.

Upon the issuance of the ALJ's decision, the parties have 14 days within which to petition the ARB for review of that decision. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing of the petition; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt.

The appeal provisions in this part provide that an appeal to the ARB is not a matter of right but is accepted at the discretion of the ARB. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. When the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard.

This section also provides that, based on exceptional circumstances, the ARB may grant a motion to stay an ALJ's preliminary order of reinstatement under CFPA, which otherwise would be effective, while review is conducted by the ARB. The Secretary believes that a stay of an ALJ's preliminary order of reinstatement under CFPA would be appropriate only where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, a balancing of possible harms to the parties, and the public interest favors a stay.

If the ARB concludes that the respondent has violated the law, it will issue a final order providing relief to the complainant. The final order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily, and the respondent will be required to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters. If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent reasonable attorney fees, not exceeding \$1,000. OSHA received no comments on this section. OSHA has removed an unnecessary abbreviation from this section, but has made no other changes to it.

Subpart C – Miscellaneous Provisions.

Section 1985.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.

This section provides the procedures and time periods for withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, and the withdrawal of objections to findings and/or orders. It permits complainants to withdraw their complaints orally, and provides that, in such circumstances, OSHA will confirm a complainant's desire to withdraw in writing. It also provides for approval of settlements at the investigative and

adjudicative stages of the case. OSHA received no comments on this section and has made no changes to it.

Section 1985.112 Judicial review.

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ARB or the ALJ to submit the record of proceedings to the appropriate court pursuant to the rules of such court. OSHA received no comments on this section and has made no changes to it.

Section 1985.113 Judicial enforcement.

This section describes the Secretary's authority under CFPA to obtain judicial enforcement of orders and terms of settlement agreements. CFPA expressly authorizes district courts to enforce orders issued by the Secretary under 12 U.S.C. 5567. Specifically, the statute provides that "[i]f any person has failed to comply with a final order issued under paragraph (4), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to have occurred, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including injunctive relief and compensatory damages." 12 U.S.C. 5567(c)(5)(A).

All orders issued by the Secretary under 12 U.S.C. 5567 may also be enforced by any person on whose behalf an order was issued in district court, under 12 U.S.C. 5567(c)(5)(B). The Secretary interprets these provisions to grant the district court authority to enforce preliminary orders of reinstatement. Subsection (c)(2)(B) provides that the Secretary shall order the person who has committed a violation to reinstate the complainant to his or her former position (12 U.S.C. 5567(c)(2)(B)). Subsection (c)(2)(B) also instructs the Secretary to

accompany any reasonable cause finding that a violation has occurred with a preliminary order containing the relief prescribed by paragraph (4)(B), which includes reinstatement, (see 12 U.S.C. 5567(c)(2)(B)). Subsection (c)(2)(C) declares that any reinstatement remedy contained in a preliminary order is not stayed upon the filing of objections. 12 U.S.C. 5567(c)(2)(C) (“The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order.”). Thus, under the statute, enforceable orders under paragraph (c)(5) include both preliminary orders issued under subsection (c)(2)(B), and final orders issued under subsection (c)(4)(A), both of which may contain the relief of reinstatement as prescribed by subsection (c)(4)(B).

This statutory interpretation is consistent with the Secretary’s interpretation of similar language in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. 42121, and Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A. See Brief for the Intervenor/Plaintiff-Appellee Secretary of Labor, Solis v. Tenn. Commerce Bancorp, Inc., No. 10-5602 (6th Cir. 2010); Solis v. Tenn. Commerce Bancorp, Inc., 713 F. Supp. 2d 701 (M.D. Tenn. 2010); but see Bechtel v. Competitive Techs., Inc., 448 F.3d 469 (2d Cir. 2006); Welch v. Cardinal Bankshares Corp., 454 F. Supp. 2d 552 (W.D. Va. 2006), (decision vacated, appeal dismissed, No. 06-2295 (4th Cir. Feb. 20, 2008)). OSHA received no comments on this section. OSHA has revised this section slightly to more closely parallel the provisions of the statute regarding the proper venue for an enforcement action.

Section 1985.114 District court jurisdiction of retaliation complaints.

This section sets forth CFPA’s provisions allowing a complainant to bring an original de novo action in district court, alleging the same allegations contained in the complaint filed with

OSHA, under certain circumstances. CFPA permits a complainant to file an action for de novo review in the appropriate district court if there has been no final decision of the Secretary within 210 days after the date of the filing of the complaint, or within 90 days after the date of receipt of a written determination. 12 U.S.C. 5567(c)(4)(D)(i). “Written determination” refers to the Assistant Secretary’s written findings issued at the close of OSHA’s investigation under section 1985.105(a). See 12 U.S.C. 5567(c)(2)(A)(ii). The Secretary’s final decision is generally the decision of the ARB issued under section 1985.110. In other words, a complainant may file an action for de novo review in the appropriate district court in either of the following two circumstances: (1) a complainant may file a de novo action in district court within 90 days of receiving the Assistant Secretary’s written findings issued under section 1985.105(a), or (2) a complainant may file a de novo action in district court if more than 210 days have passed since the filing of the complaint and the Secretary has not issued a final decision. The plain language of 12 U.S.C. 5567(c)(4)(D)(i), by distinguishing between actions that can be brought if the Secretary has not issued a “final decision” within 210 days and actions that can be brought within 90 days after a “written determination,” supports allowing de novo actions in district court under either of the circumstances described above.

However the Secretary believes that CFPA does not permit complainants to initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the complaint or within 90 days of the complainant’s receipt of the Assistant Secretary’s written findings. Thus, for example, after the ARB has issued a final decision denying a whistleblower complaint, the complainant no longer may file an action for de novo review in federal district court. The purpose of the “kick-out” provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in

a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances conflicts with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals. See 12 U.S.C. 5567(c)(4)(E) (providing that an order with respect to which review could have been obtained in the court of appeals shall not be subject to judicial review in any criminal or other civil proceeding).

Under CFPA, the Assistant Secretary's written findings become the final order of the Secretary, not subject to judicial review, if no objection is filed within 30 days. See 12 U.S.C. 5567(c)(2)(C). Thus, a complainant may need to file timely objections to the Assistant Secretary's findings in order to preserve the right to file an action in district court.

This section also requires that, within seven days after filing a complaint in district court, a complainant must provide a file-stamped copy of the complaint to OSHA, the ALJ, or the ARB, depending on where the proceeding is pending. In all cases, a copy of the district court complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the U.S. Department of Labor's Associate Solicitor for Fair Labor Standards. This provision is necessary to notify OSHA that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed. The section also incorporates the statutory provisions which allow for a jury trial at the request of either party in a district court action and specify the remedies and burdens of proof in a district court action. OSHA received no comments on this section and has made no changes to it.

Section 1985.115 Special circumstances; waiver of rules.

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of CFPA requires. OSHA received no comments on this section and has made no changes to it.

IV. Paperwork Reduction Act.

This rule contains a reporting provision (filing a retaliation complaint, Section 1985.103) which was previously reviewed and approved for use by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13). The assigned OMB control number is 1218-0236.

V. Administrative Procedure Act.

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section. Therefore, publication in the Federal Register of a notice of proposed rulemaking and request for comments are not required for these regulations, which provide the procedures for the handling of retaliation complaints. The Assistant Secretary, however, sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule is effective 30 days after publication in the Federal Register is inapplicable. The Assistant Secretary also finds good cause to provide an

immediate effective date for this final rule. It is in the public interest that the rule be effective immediately so both parties may know what procedures are applicable to pending cases.

VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132.

The Department has concluded that this rule is not a “significant regulatory action” within the meaning of section 3(f)(4) of Executive Order 12866, as reaffirmed by Executive Order 13563, because it is not likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis under Section 6(a)(3)(C) of Executive Order 12866 has been prepared.

For this reason, and because no notice of proposed rulemaking has been published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 et seq. Finally, this rule does not have “federalism implications.” The rule does not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis.

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). Rules that are exempt from APA notice and comment requirements are also exempt from the Regulatory Flexibility Act (RFA). See SBA Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act 9 (May 2012); also found at: http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf. This is a rule of agency procedure, practice, and interpretation within the meaning of that section; therefore, the rule is exempt from both the notice and comment rulemaking procedures of the APA and the requirements under the RFA.

List of Subjects in 29 CFR Part 1985.

Administrative practice and procedure, Employment, Consumer financial protection, Investigations, Reporting and recordkeeping requirements, Whistleblower.

Authority and Signature.

This document was prepared under the direction and control of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, D.C. on February 25, 2016.

David Michaels,
Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, for the reasons set out in the preamble, 29 CFR part 1985 is revised to read as follows:

PART 1985 – PROCEDURES FOR HANDLING RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE CONSUMER FINANCIAL PROTECTION ACT OF 2010.

Subpart A – Complaints, Investigations, Findings and Preliminary Orders.

Sec.

- 1985.100 Purpose and scope.
- 1985.101 Definitions.
- 1985.102 Obligations and prohibited acts.
- 1985.103 Filing of retaliation complaint.
- 1985.104 Investigation.
- 1985.105 Issuance of findings and preliminary orders.

Subpart B – Litigation.

- 1985.106 Objections to the findings and the preliminary order and requests for a hearing.
- 1985.107 Hearings.
- 1985.108 Role of Federal agencies.
- 1985.109 Decision and orders of the administrative law judge.
- 1985.110 Decision and orders of the Administrative Review Board.

Subpart C – Miscellaneous Provisions.

- 1985.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.
- 1985.112 Judicial review.
- 1985.113 Judicial enforcement.
- 1985.114 District court jurisdiction of retaliation complaints.
- 1985.115 Special circumstances; waiver of rules.

Authority: 12 U.S.C. 5567; Secretary of Labor’s Order No. 1-2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary of Labor’s Order No. 2-2012, 77 FR 69378 (Nov. 16, 2012).

Subpart A – Complaints, Investigations, Findings and Preliminary Orders.

§ 1985.100 Purpose and scope.

(a) This Part sets forth procedures for, and interpretations of, the employee protection provision of the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (CFPA or the Act), Pub. L. 111-203, 124 Stat. 1376, 1955 (July 21, 2010) (codified at 12 U.S.C. 5567). CFPA provides for employee

protection from retaliation because the employee has engaged in protected activity pertaining to the offering or provision of consumer financial products or services.

(b) This part establishes procedures under CFPA for the expeditious handling of retaliation complaints filed by employees, or by persons acting on their behalf. These rules, together with those codified at 29 CFR part 18, set forth the procedures under CFPA for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges (ALJs), post-hearing administrative review, and withdrawals and settlements. In addition, these rules provide the Secretary's interpretations on certain statutory issues.

§ 1985.101 Definitions.

As used in this part:

(a) Affiliate means any person that controls, is controlled by, or is under common control with another person.

(b) Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under CFPA.

(c) Bureau means the Consumer Financial Protection Bureau.

(d) Business days means days other than Saturdays, Sundays, and Federal holidays.

(e) CFPA means Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376, 1955 (July 21, 2010) (codified at 12 U.S.C. 5567).

(f) Complainant means the person who filed a CFPA complaint or on whose behalf a complaint was filed.

(g) Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

(h) Consumer financial product or service means any financial product or service that is:

(1) Described in one or more categories in 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Described in clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (1).

(i) Covered employee means any individual performing tasks related to the offering or provision of a consumer financial product or service. The term “covered employee” includes an individual presently or formerly working for, an individual applying to work for, or an individual whose employment could be affected by a covered person or service provider where such individual was performing tasks related to the offering or provision of a consumer financial product or service at the time that the individual engaged in protected activity under CFPA.

(j) Covered person means –

(1) Any person that engages in offering or providing a consumer financial product or service, or

(2) Any affiliate of such a person if such affiliate acts as a service provider to such person, or

(k) Federal consumer financial law means any law described in 12 U.S.C. 5481(14).

(l) OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

(m) Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

(n) Respondent means the person named in the complaint who is alleged to have violated the Act.

(o) Secretary means the Secretary of Labor or person to whom authority under CFPA has been delegated.

(p) Service provider means any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that--

(1) Participates in designing, operating, or maintaining the consumer financial product or service; or

(2) Processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes);

(3) The term “service provider” does not include a person solely by virtue of such person offering or providing to a covered person:

(i) A support service of a type provided to businesses generally or a similar ministerial service; or

(ii) Time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.

(4) A person that is a service provider shall be deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service.

(q) Any future statutory amendments that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

§ 1985.102 Obligations and prohibited acts.

(a) No covered person or service provider may terminate or in any other way retaliate against, or cause to be terminated or retaliated against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting or disciplining, any covered employee or any authorized representative of covered employees because such employee or representative, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee), engaged in any of the activities specified in paragraphs (b)(1) through (4) of this section. (b) A covered employee or authorized representative is protected against retaliation (as described in paragraph (a) of this section) by a covered person or service provider because he or she:

(1) Provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency, information relating to any violation of, or any act or omission that the employee reasonably believes to be a violation of, any provision of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376, 1955 (July 21, 2010), or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(2) Testified or will testify in any proceeding resulting from the administration or enforcement of any provision of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376, 1955 (July 21, 2010), or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(3) Filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or

(4) Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the Bureau.

§ 1985.103 Filing of retaliation complaint.

(a) Who may file. A person who believes that he or she has been discharged or otherwise retaliated against by any person in violation of CFPA may file, or have filed by any person on his or her behalf, a complaint alleging such retaliation.

(b) Nature of filing. No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language.

(c) Place of filing. The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the complainant resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address:

<http://www.osha.gov>.

(d) Time for filing. Within 180 days after an alleged violation of CFPA occurs, any person who believes that he or she has been retaliated against in violation of the Act may file, or have filed by any person on his or her behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with an agency other than OSHA within 180 days after an alleged adverse action.

§ 1985.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, OSHA will notify the respondent of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint. Such materials will be redacted, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also notify the respondent of its rights under paragraphs (b) and (f) of this section and paragraph (e) of § 1985.110. OSHA will provide an unredacted copy of these same materials to the complainant (or the complainant's legal counsel if complainant is represented by counsel) and to the Bureau.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent and the complainant each may submit to OSHA a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent and the complainant each may request a meeting with OSHA to present its position.

(c) During the investigation, OSHA will request that each party provide the other parties to the whistleblower complaint with a copy of submissions to OSHA that are pertinent to the whistleblower complaint. Alternatively, if a party does not provide its submissions to OSHA to the other party, OSHA will provide them to the other party (or the party's legal counsel if the party is represented by counsel) at a time permitting the other party an opportunity to respond. Before providing such materials to the other party, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA will also provide each party with an opportunity to respond to the other party's submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

- (i) The employee engaged in a protected activity;
- (ii) The respondent knew or suspected that the employee engaged in the protected activity;
- (iii) The employee suffered an adverse action; and
- (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, i.e., to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complaint shows that the adverse action took place within a temporal proximity of the protected activity, or at the first opportunity available to the respondent, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, OSHA will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1985.105, if OSHA has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated CFPA and that preliminary reinstatement is warranted, OSHA will contact the respondent (or the respondent's legal counsel if respondent is

represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials, OSHA will redact them, if necessary, consistent with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of OSHA's notification pursuant to this paragraph, or as soon thereafter as OSHA and the respondent can agree, if the interests of justice so require.

§ 1985.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of CFPA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief to the complainant. The preliminary order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions and

privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested (or other means that allow OSHA to confirm receipt), to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or order and to request a hearing, and of the right of the respondent to request an award of attorney fees not exceeding \$1,000 from the ALJ, regardless of whether the respondent has filed objections, if the respondent alleges that the complaint was frivolous or brought in bad faith. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and any preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection

and/or a request for hearing has been timely filed as provided at § 1985.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

Subpart B – Litigation.

§ 1985.106 Objections to the findings and the preliminary order and requests for a hearing.

(a) Any party who desires review, including judicial review, of the findings and/or preliminary order, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees under CFPA, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1985.105. The objections, request for a hearing, and/or request for attorney fees must be in writing and state whether the objections are to the findings, the preliminary order, and/or whether there should be an award of attorney fees. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of

any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or the preliminary order will become the final decision of the Secretary, not subject to judicial review.

§ 1985.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. ALJs have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

§ 1985.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding and must be served with copies of all documents in the case. At the Assistant Secretary's discretion, the

Assistant Secretary may participate as a party or as amicus curiae at any time at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) Parties must send copies of documents to OSHA and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, only upon request of OSHA, or when OSHA is participating in the proceeding, or when service on OSHA and the Associate Solicitor is otherwise required by these rules.

(b) The Bureau, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at the Bureau's discretion. At the request of the Bureau, copies of all documents in a case must be sent to the Bureau, whether or not it is participating in the proceeding.

§ 1985.109 Decision and orders of the administrative law judge.

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither OSHA's determination to dismiss a complaint without completing an investigation pursuant to § 1985.104(e) nor OSHA's determination to proceed with an

investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ALJ determines that a complaint was frivolous or was brought in bad faith, the ALJ may award to the respondent reasonable attorney fees, not exceeding \$1,000.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely

petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. The decision of the ALJ will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.

§ 1985.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ, or a respondent alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney fees, must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review must be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB, unless the ARB grants a motion by the

respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision will also be served on the Assistant Secretary and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions, and privileges of the complainant's employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The order will also require the respondent to submit appropriate

documentation to the Social Security Administration allocating any back pay award to the appropriate calendar quarters.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint. If, upon the request of the respondent, the ARB determines that a complaint was frivolous or was brought in bad faith, the ARB may award to the respondent a reasonable attorney fee, not exceeding \$1,000.

Subpart C – Miscellaneous Provisions.

§ 1985.111 Withdrawal of complaints, findings, objections, and petitions for review; settlement.

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying OSHA, orally or in writing, of his or her withdrawal. OSHA then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. OSHA will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or preliminary order at any time before the expiration of the 30-day objection period described in § 1985.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or order become final, a party may withdraw objections to the Assistant Secretary's findings and/or order by filing a written withdrawal with the ALJ. If the case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) Investigative settlements. At any time after the filing of a complaint, but before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if OSHA, the complainant, and the respondent agree to a settlement. OSHA's approval of a settlement reached by the respondent and the complainant demonstrates OSHA's consent and achieves the consent of all three parties.

(2) Adjudicatory settlements. At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ, or by the ARB if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB, as appropriate.

(e) Any settlement approved by OSHA, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in United States district court pursuant to § 1985.113.

§ 1985.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1985.109 and 1985.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(b) A final order is not subject to judicial review in any criminal or other civil proceeding.

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

§ 1985.113 Judicial enforcement.

Whenever any person has failed to comply with a final order, including one approving a settlement agreement, issued under CFPA, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred or in the United States district court for the District of Columbia.

Whenever any person has failed to comply with a preliminary order of reinstatement, or a final order, including one approving a settlement agreement, issued under CFPA, the person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the appropriate United States district court.

§ 1985.114 District court jurisdiction of retaliation complaints.

(a) The complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy, either:

(1) Within 90 days after receiving a written determination under § 1985.105(a) provided that there has been no final decision of the Secretary; or

(2) If there has been no final decision of the Secretary within 210 days of the filing of the complaint.

(b) At the request of either party, the action shall be tried by the court with a jury.

(c) A proceeding under paragraph (a) of this section shall be governed by the same legal burdens of proof specified in § 1985.109. The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including:

(1) Reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;

(2) The amount of back pay, with interest;

(3) Compensation for any special damages sustained as a result of the discharge or discrimination; and

(4) Litigation costs, expert witness fees, and reasonable attorney fees.

(d) Within seven days after filing a complaint in federal court, a complainant must file with OSHA, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. In all cases, a copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

§ 1985.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days' notice to all parties, waive any rule or issue such orders that justice or the administration of CFPA requires.

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